

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TYRONE TYNER)	
Claimant)	
VS.)	
)	Docket No. 196,907
SOUTHEASTERN PUBLIC SERVICE)	
Respondent)	
AND)	
)	
INSURANCE CO. STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from an Award entered by Administrative Law Judge Robert H. Foerschler on May 19, 1998. The Appeals Board heard oral argument on December 21, 1998.

APPEARANCES

John G. O'Connor of Kansas City, Kansas, appeared on behalf of claimant. D'Ambra M. Howard of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant benefits for a 61 percent work disability based on a 50 percent wage loss and a 95 percent loss of ability to perform tasks, reduced by 11.5 percent for preexisting disability.

On appeal, respondent requests review of the following issues:

1. Did claimant sustain accidental injury arising out of and in the course of his employment?
2. What is the nature and extent of claimant's disability, if any?

3. Is claimant entitled to temporary total disability benefits?
4. Is claimant entitled to future medical benefits?
5. Is claimant entitled to the unauthorized medical allowance?
6. What is the compensation due, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds, from its review of the record, claimant sustained a temporary injury only, not a permanent injury, and the Award should be reversed.

Findings of Fact

1. Claimant suffered accidental injury arising out of and in the course of his employment on November 2, 1994. The accident occurred as claimant was tying racks around pallets. The rope snapped and he fell back against the racks, striking his spine about six inches above the belt line. Claimant did not experience immediate pain but later that day his back tightened.
2. Claimant reported the accident to his supervisor, filled out an accident report, and requested medical treatment. Claimant was told he was not eligible to have workers compensation benefits because he had not been off work for seven days. Claimant then went on his own to his family physician, Dr. Gary Legler. Claimant saw Dr. Legler on November 9, 14, and 21, for back pain, but Dr. Legler's records contain no mention of a work-related injury. At the first visit of November 9, claimant reported back pain for four days.
3. Dr. Legler diagnosed a back strain and released claimant to return to work as of November 10, 1994. Claimant worked a full day on November 10, but on November 11 he worked only one hour before reporting back pain. Claimant was sent home. Claimant did not work most of the days between November 11, 1994, and December 8, 1994, when he was terminated for not calling in or reporting to work. Claimant testified he did not call because he had to call by 4 a.m. and he was on muscle relaxants so did not wake up in time. He did call in "sick" on a number of the days he missed.
4. On December 2, 1994, claimant went to the emergency room of Providence-St. Margaret Health Center. Claimant testified he told emergency room personnel about the incident at work. The emergency room record states: "fell against wood-hurt side." The complaints were of lower quadrant abdominal pain with some back pain on the right. Claimant was advised not to do heavy lifting and not to work again until Monday. He was given medication and a truss. Claimant did not show up for two scheduled appointments with Dr. Legler after the emergency room visit.

5. Claimant worked for Crown Temporary Service after leaving respondent, but he testified he worked only a few jobs and had to quit because of the pain he was having.

6. Claimant did not receive additional medical treatment until he saw Dr. Michael J. Poppa, at respondent's request, in May 1995. Dr. Poppa concluded claimant suffered a contusion and strain of his lower back on November 2, 1994, with no residual impairment. He considered claimant to have reached maximum medical improvement and released him to full employment without restrictions. Dr. Poppa also noted preexisting scoliosis.

7. Claimant was next seen by Dr. Mark B. Williamson, Jr., an orthopedic surgeon, apparently by referral from Dr. Legler. Dr. Williamson concluded claimant had either some intracanal pathology associated with the scoliosis, which had been asymptomatic until the work related injury, or mechanical back pain due to the injury which would have resolved were it not for the preexisting scoliosis. He recommended additional testing, including an MRI.

8. After the examination by Dr. Williamson, respondent agreed to provide treatment under the direction of Dr. Jeffrey T. MacMillan. Dr. MacMillan, who first saw claimant September 8, 1995, recommended work hardening. Dr. MacMillan provided an impairment rating of 3 percent but testified this was due to the congenital scoliosis, not the work-related injury. He stated he could not demonstrate a permanent aggravation of the scoliosis due to work activities. He believed either claimant was having pain before the accident or claimant is complaining far out of proportion to what he is truly feeling.

9. Claimant was seen on December 10, 1996, by Dr. David A. Tillema at the request of the ALJ. Dr. Tillema rated claimant's impairment as 15 percent of the whole body. He discussed causation but does not come to a definite conclusion. As to causation he states:

There is also a question of causation. This gentleman indicated that he had a definite injury where he fell back and hurt his back. If indeed this is valid then I think there was a question of aggravation of a preexisting congenital problem, but for the preexisting congenital problem he would not have had the present condition.

I am a bit confused and refer one to the emergency room record from Providence Medical Center, dated 12/02/94 where the History of Present Illness states that "The patient gives a history of left lower quadrant abdominal pain, times two days with some low back pain on the right". They also state that "When he was at work one month ago he felt a pulling in the left lower quadrant of his abdomen when he was lifting and that has continued". If indeed he had a pulling sensation in the abdomen and did not have a direct trauma to the back then I would doubt that the on-the-job injury as the emergency room describes has any significant aggravation or causation of his permanent impairment and if that indeed is the case, then I would not feel that the work injury contributed significantly to his overall impairment.

Dr. Tillema recommended claimant see Dr. Marc Asher if surgery were contemplated.

10. Claimant has congenital scoliosis. He was treated for the scoliosis by Dr. Marc Asher of the University of Kansas Medical Center. Dr. Asher also examined claimant on February 18, 1997, several years after the current injury. His report of February 18, 1997, which the parties introduced by stipulation, states his conclusion that the injury aggravated the underlying congenital scoliosis:

It does appear that his industrial injury about November 2, 1994 aggravated his underlying congenital scoliosis and probably associated degenerative facets. Because of the time relationship of the injury to the onset of symptoms it seems likely that the injury was involved with worsening his symptoms.

11. At the request of claimant's counsel, claimant was examined by Dr. P. Brent Koprivica. Dr. Koprivica saw claimant March 25, 1997. Dr. Koprivica found loss of range of motion which he attributed to the November 2, 1994, injury based on records he reviewed from Drs. Shechter and Asher. He also found involuntary muscle spasms. He opined that claimant has a chronic thoracolumbar strain and aggravation of preexisting degenerative disease of the thoracic and lumbar spine as a direct result of the November 2, 1994, injury. He rated the impairments as 23 percent of the whole body. He also recommended the following restrictions:

The work restrictions I would place on Mr. Tyner at this time are very severe. I would limit him to 15 pounds of lifting or carrying activities on an occasional basis as a maximum. He should not do any frequent or constant bending at the waist, pushing, pulling or twisting. He should not do climbing types of activities. He should avoid sustained or awkward postures of the lumbar spine. He should only occasionally squat, crawl or kneel. Captive sitting should be limited to fifteen-minute intervals. Captive standing should be similarly limited. He will need to be afforded the opportunity to change postures on an as-needed basis.

12. Dr. Koprivica reviewed a list of tasks prepared by Michael J. Dreiling. The list identified the tasks claimant had done in work during the 15 years before the injury. Dr. Koprivica testified claimant cannot now perform 21 of 22 tasks for a 95 percent loss.

13. Karen C. Terrill, vocational expert, also prepared a list of tasks but no physician provided an opinion about which of those tasks claimant cannot perform. She testified that claimant has the ability to earn \$240 to \$280 per week.

14. Except for some work for a temporary agency shortly after the accident, claimant has not been employed. The record does not show what efforts claimant has made to find employment.

15. Claimant injured his low back from a serious fall in 1987. He was treated and an impairment rating assigned by Dr. Shechter.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).
2. The Board concludes claimant has proven by a preponderance of the credible evidence that he sustained personal injury by accident arising out of and in the course of his employment on November 2, 1994.
3. The Board concludes the accident claimant suffered in his work for respondent was a temporary aggravation only and concludes he did not suffer any additional permanent impairment above and beyond the impairment which existed from the congenital scoliosis. This conclusion is based on the report from Dr. Poppa, the report from Dr. Tillema, and the testimony of Dr. MacMillan. The Board would have given significant weight to the conclusions of Dr. Asher except for the substantial period of time between the accident and the post-injury examination by Dr. Asher.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler on May 19, 1998, should be, and is hereby, reversed.

Claimant is awarded temporary total disability and medical benefits previously paid.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Kansas City, KS
D'Ambra M. Howard, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director